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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PHOENIX ANCIENT ART, S.A., et  
al.,

Plaintiffs,

New York, N.Y.

v.

24 CV 1699 (GHW)

QATAR INVESTMENT AND PROJECT  
HOLDING, CO, W.L.L., et al.,

Defendants.

Motion (Telephonic)

May 10, 2024  
3:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

PEARLSTEIN & McCULLOUGH, LLP  
Attorneys for Plaintiffs

BY: MICHAEL McCULLOUGH  
WILLIAM PEARLSTEIN  
ANJU UCHIMA

HUGHES HUBBARD & REED, LLP  
Attorneys for Defendant QIPCO

BY: DUSTIN P. SMITH  
GREGORY C. FARRELL  
J. SCOTT SANDERS II

FLASTER/GREENBERG P.C.  
Attorneys for Defendant Simon Jones Superfreight  
BY: CHRISTOPHER J. MERRICK

MICHAEL WHITTICAR  
NICOLE A. SULLIVAN

Attorneys for Defendant Phoenix Freight Inc. d/b/a Door to  
Door Fine Art Services

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1 THE COURT: First I'd like to ask everybody to place  
2 their phones on mute. We're hearing a lot of background noise  
3 and reverb. Everyone, please place your phones on mute and  
4 please keep them on mute unless you are a participant in this  
5 conference and you are intentionally speaking to me or to the  
6 representative of a party. Thank you.

7 So, let me begin by taking appearances from the  
8 parties. I am going to ask the principal spokesperson for each  
9 side to identify him or herself and the members of their team,  
10 rather than having each lawyer introduce themselves  
11 individually.

12 So let me begin with counsel for plaintiff. Who is on  
13 the line for plaintiff?

14 MR. McCULLOUGH: For plaintiff, good afternoon, your  
15 Honor. For plaintiff, Michael McCullough, Pearlstein  
16 McCullough, LLP. I'm joined today by my co-counsels William  
17 Pearlstein and Anju Uchima.

18 THE COURT: Thank you. And who is on the line for  
19 defendants?

20 MR. SMITH: Good afternoon, your Honor. This is  
21 Dustin Smith from Hughes Hubbard & Reed appearing on behalf of  
22 Qatar Investment and Project Holdings Co. or QIPCO. I am here  
23 with my colleagues Scott Sanders and Greg Farrell.

24 THE COURT: Who is on line for defendant Phoenix  
25 Freight?

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1 MR. WHITTICAR: Michael Whitticar, your Honor. With  
2 my local counsel Nicole Sullivan.

3 THE COURT: Thank you. So, let me begin with a few  
4 brief instructions about the rules that I'd like the parties to  
5 follow during this conference. At the outset --

6 MR. MERRICK: Good afternoon, your Honor. Chris  
7 Merrick on behalf of defendant Simon Jones Superfreight. Thank  
8 you.

9 THE COURT: So, at the outset, let me begin by  
10 reminding parties that this is a public proceeding. Any member  
11 of the public or press is welcome to dial into this conference.  
12 I'm not monitoring whether third parties are auditing the  
13 conference, but they're welcome to do so. I ask you to keep  
14 that possibility in mind.

15 Second, again, please keep your phones on mute. You  
16 all have done it, so please keep it up. Background noise can  
17 be distracting, so please keep your phones on mute, even if you  
18 don't think that there is background noise wherever you may be.

19 Third, please state your name each time that you speak  
20 during this conference.

21 Fourth, please abide by instructions from the court  
22 reporter that are designed to help the court reporter do their  
23 job.

24 And finally, I'm ordering that there be no recording  
25 or rebroadcast of all or any portion of today's conference.

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1 Counsel, with all of that out of the way, let's turn  
2 to the substance of today's conference. This is a conference  
3 to discuss defendant Qatar Investment and Project Holding Co.'s  
4 proposed motion to dismiss the claims against it on a couple of  
5 grounds. So what I'd like to do is to hear from each of the  
6 parties regarding the basis for the motion and the anticipated  
7 arguments in response.

8 I've looked at the parties' letters, but I would be  
9 willing to hear from each of the parties, to the extent that  
10 you'd like to supplement or clarify your positions. I am going  
11 to start with counsel for defendant, and to the extent that you  
12 would like to -- that is defendant Qatar -- and to the extent  
13 you'd like to respond to some of the anticipated arguments in  
14 response that have been previewed in plaintiff's letter, you  
15 should feel free to do so.

16 Let me hear from counsel for defendant Qatar.

17 MR. SMITH: Dustin Smith from Hughes Hubbard & Reed on  
18 behalf of defendant QIPCO. Good afternoon, your Honor.

19 I won't repeat the main argument that we made in our  
20 letter to the Court requesting the conference in order to tee  
21 up the motion to dismiss. But, I will take you up on your  
22 offer to respond to some of the issues that were raised by the  
23 plaintiffs in their response.

24 Specifically, regarding the scope of the forum  
25 selection clause that's contained within the sale and purchase

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1 agreements. The dispute related to the artifacts, as laid out  
2 in the complaint, has its genesis in these two sale and  
3 purchase agreements. And the scope of the sale and purchase  
4 agreements I think is where the dispute really lies. Our  
5 position is that the language of the exclusive jurisdiction  
6 provision which provides for any disputes that arise out, arise  
7 out of or in connection with the underlying sale and purchase  
8 are covered by those exclusive jurisdiction provisions. And  
9 that the dispute over the exchange is something that is arising  
10 out of or in connection with the sale and purchase agreements.

11 And I understand that the plaintiffs have taken a  
12 different position. They are arguing for a more narrow  
13 reading, but we believe that is incorrect. And their arguments  
14 related to New York law governing the purported agreement in  
15 principle that they believe govern the exchange. We think  
16 that's a little bit of a red herring. With these two  
17 underlying agreements we think that's where the Court should  
18 look to, and if the Court looks at that and the force of those  
19 provisions, the instant case should be dismissed and should be  
20 brought appropriately before the English courts where there is  
21 already a proceeding ongoing.

22 And finally I'll raise in relation to the fraud claim,  
23 I know that defendants have raised the third-party reliance  
24 doctrine. I would just note that that doctrine has been  
25 superseded by a case out of the New York Court of Appeals in

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1 2016, that has found that the third-party reliance doctrine  
2 cannot support a claim for fraud. And that case is *Pasternack*  
3 *v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 2016.

4 And in relation to that, the second request that we  
5 made in our letter was for a stay of discovery for two reasons.  
6 One, in light of the motion to dismiss that we would like to  
7 bring, and then two, as a result of the anti-suit injunction  
8 request that has been made in the English proceeding. We  
9 believe that it would be duplicative and a waste of resources  
10 by the parties to engage in discovery at this time while both  
11 of those issues are pending.

12 By way of background, from conversations with our  
13 English counsel, we understand that discovery is ongoing in  
14 England, and a more pragmatic approach would be to stay  
15 discovery in the U.S. allow both the motion to proceed, see how  
16 the anti-suit motion comes out, and also see how discovery  
17 comes out in the English proceeding. We think that would leave  
18 a much more limited set of follow-up discovery here, if any  
19 discovery is required, and would be a more efficient use of  
20 resources for all the parties, but also for the Court. It  
21 should minimize the area of potential areas of dispute that  
22 could come up in discovery in the future.

23 And I would just say that we recognize that the  
24 plaintiffs have taken the position that they are opposed to  
25 that stay. And we note that once again from conversations with

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1 our English counsel, we would hope in light of the positions  
2 they've taken in England, that they would join us in seeking to  
3 avoid any unnecessary costs in the current proceeding.

4 THE COURT: Thank you. First, what are you alluding  
5 to when you say in light of the positions they're taking in the  
6 U.K. proceeding? What are you referring to?

7 MR. SMITH: It is our understanding that in response  
8 to the anti-suit injunction, and to the pleadings that are  
9 ongoing in the English proceeding, that they've raised concerns  
10 over the cost of the English proceedings and the litigation  
11 surrounding that. And I think everyone shares a common concern  
12 of making sure that the costs are limited and kept down here.  
13 And that is one of the reasons why we're seeking the discovery  
14 stay.

15 THE COURT: Thank you. And what is your understanding  
16 of the timeline for resolution of the anti-suit injunction  
17 application in the United Kingdom?

18 MR. SMITH: Your Honor, if I may, I have my associate  
19 Scott Sanders on line. Would you mind if I kicked this over to  
20 him to just provide an update on that timeline?

21 THE COURT: No, that's fine.

22 MR. SANDERS: Good afternoon, your Honor. This Scott  
23 Sanders of Hughes Hubbard & Reed.

24 With respect to the anti-suit injunction, as we set  
25 forth in our premotion conference letter, that application will

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1 be heard in less than a week on May 15 and 16th. We do not  
2 know exactly when the decision will be rendered, although our  
3 understanding is that English courts will hopefully move  
4 relatively quickly in deciding the motion, just as U.S. courts  
5 do with respect to injunctions here.

6 THE COURT: Thank you. Good. Anything else, counsel  
7 for plaintiff?

8 MR. SMITH: The only other clarification I would like  
9 to make in response to their letter, I believe they've raised  
10 this concept that our position in this case is inconsistent  
11 with the position that our English counsel has taken in the  
12 anti-suit injunction. And I think that's just a  
13 misunderstanding. In the motion or the equivalent, the  
14 pleadings that English counsel has filed in the English  
15 proceeding, they've clearly stated that the primary argument in  
16 support of the anti-suit injunction is the exclusive  
17 jurisdiction provision contained in both of the SPAs, and as a  
18 secondary alternative argument, they have raised the concept  
19 that the alleged meeting of the minds and agreement in  
20 principle that the plaintiffs referred to in their complaint  
21 would incorporate a similar exclusive jurisdiction provision.  
22 So just wanted to note that the primary argument in the English  
23 proceeding, much as it is here, is the exclusive jurisdiction  
24 provision of the SPAs govern.

25 THE COURT: Let me hear from counsel for plaintiff.



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1 MR. McCULLOUGH: This is Michael McCullough. Our  
2 position is that the two SPAs that were negotiated under  
3 English law for the purchase of the two items are inoperative.  
4 The parties intended at the time of the exchange, which is four  
5 years after the purchases, to create a new agreement. And the  
6 reason for that is that Phoenix was -- did not -- was not  
7 interested in rescinding agreements, because Phoenix didn't  
8 agree that there was an issue with the objects. QIPCO claimed  
9 that the objects were fake, that they weren't authentic. And  
10 the reports that Phoenix was able to obtain show that the  
11 objects were authentic. There was no issue. There was no  
12 agreement on rescision.

13 Instead what the parties intended was to create a new  
14 agreement, outside of the original SPAs, that would govern an  
15 exchange. So instead of rescision and return and exchange, this  
16 is no rescision, let's just do a swap to make everyone happy.  
17 So we referred to that as the exchange agreement that was  
18 agreed in 2018. That exchange agreement did not contain --  
19 which under New York law, as we point out, did not contain  
20 anything on forum and choice of law.

21 Now, as we say in our letter, the contacts with New  
22 York and the performance in New York favors New York forum and  
23 New York law, with regard to the interpretation of that  
24 superseding exchange agreement. In addition, as QIPCO's  
25 argued --

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1 THE COURT: Before you move on, let me -- please take  
2 a moment to write down what you're about to say.

3 MR. McCULLOUGH: Sure.

4 THE COURT: Good. So just want you to be able to come  
5 back to your place. I apologize for interrupting.

6 MR. McCULLOUGH: Sure.

7 THE COURT: First you say that your understanding was  
8 that the parties expected that there would be -- that this was  
9 in lieu of rescinding the contract. So you are saying this was  
10 in lieu of rescinding the sale and purchase agreements?

11 MR. McCULLOUGH: That's right. Not in lieu of. I  
12 would say it -- because there was no agreement to rescind on  
13 behalf of the seller, Phoenix. This was simply an  
14 accommodation that was a separate agreement on a swap. So  
15 instead of recision and return, this was just a swap. No  
16 recision.

17 THE COURT: Thank you. Good. And can you just take a  
18 couple of minutes if you wouldn't mind talking me through what  
19 constitutes the, quote unquote, exchange agreement? That would  
20 be helpful for me to hear from counsel about what series of  
21 acts comprised that agreement.

22 MR. McCULLOUGH: So in 2018, preceding the  
23 September 20 sort of consummation of the agreement, there are a  
24 series of e-mails and discussions that happened between the  
25 parties about a swap. And the reason why Phoenix was

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1 interested in a swap is because the original two items, the  
2 purchased items are authentic, Phoenix had other buyers for  
3 those. This was a good deal for Phoenix. They were interested  
4 in doing a swap.

5 The consummation of the agreement was when QIPCO's  
6 agent Marc Latamie, who is based in New York, came to the  
7 gallery, spoke with Sheikh Hamad, via WhatsApp, showed the  
8 Sheikh the objects, images on WhatsApp, and the Sheikh said  
9 "yes" on WhatsApp. And then Sheikh Hamad's agreement to the  
10 swap was agreed by his agent Marc Latamie at the gallery. So  
11 all of this happens in New York at the gallery.

12 Then there are a series of e-mails and discussions  
13 about the mechanics of the swap. And we pointed those out in  
14 our letter. So a series of e-mails and discussions before the  
15 20th September 2018, there is the WhatsApp discussion and agent  
16 agreement on the 20th of September 2018, then there are e-mails  
17 on mechanics of the swap that come after.

18 THE COURT: Thank you. And do any of those  
19 communications reference the purchase agreement or the effect  
20 of the exchange agreement on the underlying purchase agreements  
21 or what I'll describe it as just the purchase agreement?

22 MR. McCULLOUGH: Not to my knowledge. No, because  
23 the -- Phoenix's point of this exchange was not to rescind the  
24 original agreements. This was simply a matter of accommodation  
25 for both parties, and again, Phoenix's interest here was they

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1 had buyers for the original objects. So there was a good deal  
2 for Phoenix let's say.

3 Are there any other questions? I'd like to get back  
4 to the point I was about to make.

5 THE COURT: Please go on. I apologize for the  
6 interruption.

7 MR. McCULLOUGH: No. It is important to the second  
8 point, to bolster this argument that this is a separate  
9 agreement.

10 In the U.K. proceedings, QIPCO has taken the position  
11 that there is a written agreement that governs the exchange.  
12 And we pointed out in our letter, there was a deed of exchange  
13 that was drafted by QIPCO's lawyers, the same lawyers who draft  
14 the SPAs, based on the negotiations that were -- the pre- maybe  
15 pre- and post-September 20, 2018 agreement or consummation of  
16 the agreement. And that deed of exchange was delivered to  
17 QIPCO's agent in New York, Marc Latamie. However, Mr. Latamie  
18 never transmitted that agreement to Phoenix. So it is a  
19 unilateral agreement that was never transmitted -- and never  
20 signed by Phoenix. So Phoenix knew nothing about it until just  
21 recently through the U.K. litigation.

22 Now, again, in the U.K., QIPCO is saying that is an  
23 operative agreement for the exchange, not the New York  
24 agreement that I described through the e-mails, oral  
25 discussions, consummation on 20th of September 2018, and

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1 subsequent e-mails on process. They're saying this deed is an  
2 operative agreement. Now, that contradicts QIPCO's position  
3 here on the motion. Because if there is -- the question really  
4 is, is it the exchange agreement I'm describing, or is it the  
5 deed. Our position is clear it is the exchange agreement. It  
6 is not the deed. But again, there is an argument in the U.K.,  
7 in the U.K. discussions that the deed is an operative exchange  
8 agreement, which again, shows that the parties intended to have  
9 a separate agreement.

10 Now, one last point on the exchange agreement which I  
11 find fascinating is the exchange agreement has forum, it has  
12 choice of law, it also has reps and warranties on performance.  
13 Which, again, which is sort of being argued through the back  
14 door by QIPCO here. And that we're addressing their  
15 performance obviously in our fraud claim. But it is curious to  
16 me how all of these issues that QIPCO is bringing up is  
17 addressed in this document, but now I'm hearing it's not  
18 operative and the SPAs are the agreement that's operative with  
19 regard to forum and choice of law.

20 Should I move on to fraud, your Honor?

21 THE COURT: Yes. But let me just ask a question. The  
22 defendants argue that the purchase agreement language relates  
23 not only to claims arising under but also in connection with  
24 the purchase agreement.

25 What's your argument that this exchange agreement is

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1 not in connection with that agreement, even if it does not  
2 arise under it?

3 MR. McCULLOUGH: It's not connected simply because  
4 there wasn't an agreement about -- there was no subsequent  
5 agreement about authenticity, both, again, there is no --  
6 Phoenix never agreed that this issue on authenticity, there's  
7 no subsequent rescission, and there's -- the exchange has nothing  
8 to do with that issue, with the issue of the original objects.  
9 There is no -- the objects are subject to a second agreement on  
10 an exchange. It had nothing to do with the original objects,  
11 other than the fact that the objects are in the original  
12 exchange.

13 THE COURT: Thank you. And so, you may go on to  
14 fraud. Thank you.

15 MR. McCULLOUGH: So, on the fraud point, you know,  
16 there is another case that we came up with, which is a 2020  
17 case which is *Shavolian v. Donegan*. It is 2020 New York slip  
18 opinion 31, 181, 5th of May 2020, New York County, which is  
19 subsequent to the 2016 agreement that finds the same, that a  
20 third party, a fraud perpetrated on a third party that has an  
21 effect on a plaintiff is allowable as a source of the fraud.

22 And again, I just want to state how important it is to  
23 the plaintiff here that there is redress on this fraud. What  
24 happened here is that very sophisticated parties held back  
25 material information from the U.S. government about possibly

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1 sanctioned material and licensable material in the U.S., at the  
2 time of export, which deprived the United States government of  
3 screening that property. We don't make that allegation  
4 lightly, but that's exactly what happened here. If there is no  
5 redress for that behavior, that goes unabated and that's -- we  
6 find that reprehensible. So, again we'll spend --

7 THE COURT: Counsel, I'm sorry, let me pause you. Who  
8 is the victim of that fraudulent conduct?

9 MR. McCULLOUGH: Well, the U.S. government is the  
10 victim. So the people of the United States of America are the  
11 victim. Again, because I should also state and it doesn't come  
12 through in our letter. Phoenix was very concerned that this  
13 could happen. So on a number of occasions, they reminded  
14 QIPCO and its agents that these are pre-Achaemenid objects and  
15 need to be properly declared. That's exactly what didn't  
16 happen. Which is another reason why this -- another reason why  
17 under the exchange agreement, it would never have been  
18 negotiated by Phoenix under New York law. Because they were  
19 very concerned about this. They were very diligent in pointing  
20 this out. And what they were concerned about is exactly what  
21 happened. What happened was that information about the Iranian  
22 origin of these objects was scrubbed from the documents, and  
23 that commercial invoice that did not include pertinent,  
24 material pertinent information to the U.S. government.

25 So to answer the question shortly, the U.S. government

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1 and the people of the United States are the ones that are  
2 harmed by that fraud. Now ultimately, it did harm the  
3 plaintiff in the sense that the plaintiff was listed by the  
4 shipping companies as -- Phoenix was listed as the exporter,  
5 and because QIPCO is not in the United States, Phoenix had to  
6 clean up the mess. Phoenix is the one that spent almost a half  
7 a million dollars -- a million and a half dollars cleaning this  
8 mess up.

9 THE COURT: Thank you. And what was the fraud on  
10 plaintiff?

11 MR. McCULLOUGH: Well, plaintiff is harmed -- look,  
12 the fraud was on the U.S. government. The fraud affected the  
13 plaintiff and the harm on the plaintiff, again, is having to  
14 spend a million and a half dollars and 5 years of legal fees  
15 and ultimately the statute of limitation ran on the claim, the  
16 five-year statute of limitation or the customs law ran and the  
17 objects were returned only because the statute of limitations  
18 ran. The statute ran and the objects were sent back to  
19 plaintiff. But, again, the harm is to the plaintiff, the fraud  
20 is on the government. And again under the case law, we believe  
21 that we can use that fraud to redress our harm.

22 THE COURT: Thank you. And what's your view of the  
23 Court of Appeals decision that counsel for defendant pointed us  
24 to during their remarks?

25 MR. McCULLOUGH: I haven't read that decision. Again,



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1 we had the earlier decision, we have this later decision that  
2 I'm looking at, I have not read that decision. I'm happy to  
3 address it in a letter to you if you'd like.

4 THE COURT: Thank you. That's fine.

5 So, let me hear from the other defendants and then I  
6 want to come back to counsel for plaintiff to give you the  
7 opportunity to respond to QIPCO's request for the imposition of  
8 a stay. I'd like to hear from each of the two other defendants  
9 in turn.

10 My principal question here is whether you take a  
11 position regarding this motion in particular, and whether you  
12 take a motion as to the applicability of the stay, and whether  
13 a stay on the grounds asserted by the QIPCO defendant would or  
14 should redound to the benefits of the other defendants.

15 I'll start with defendant Simon Jones. Counsel?

16 MR. MERRICK: Chris Merrick on behalf of Simon Jones  
17 Superfreight. We take no -- we have no opposition, and in fact  
18 support the idea of the stay. We believe that discovery is  
19 expensive, and burdensome, and we have not finalized exactly  
20 what we plan to do. I think it's likely we end up filing a  
21 motion to dismiss as well. And we believe that the issues  
22 raised in the motion to dismiss should be resolved before the  
23 parties proceed to discovery.

24 THE COURT: Thank you. Counsel for Phoenix Freight,  
25 let me hear from you.

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1 MR. WHITTICAR: Yes, your Honor. This is Mike  
2 Whitticar for Phoenix Freight DTD. We don't have a position as  
3 to QIPCO's motion to transfer the claims against it to England  
4 or elsewhere. We're not joining in that motion and we plan on  
5 having our claims determined here.

6 THE COURT: Thank you.

7 MR. WHITTICAR: We do anticipate filing a motion to  
8 dismiss, but under different grounds.

9 THE COURT: Thank you. Fine. Very good. So, let me  
10 turn back to counsel for plaintiff. Counsel, you have heard  
11 the arguments presented by counsel for defendant QIPCO in favor  
12 of a stay. How do you respond?

13 MR. McCULLOUGH: Michael McCullough. There are two  
14 issues that the plaintiff Phoenix is facing if we look at this  
15 question globally between the two jurisdictions. One is  
16 hardship. Phoenix is owned by two individuals, Electrum, which  
17 is Phoenix's agent, is owned by one of those individuals.  
18 Wholly owned by one of those individuals. And it is a small  
19 business. So, the hardship on Phoenix is significant compared  
20 to QIPCO. QIPCO is run by members of the Qatari royal family.  
21 It has tremendous resources.

22 Phoenix has been punching above its weight in the U.K.  
23 litigation, but it's cumbersome, it's expensive, and frankly,  
24 it should end.

25 So what we hope, both because of the cost issues but

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1 also because we think New York is the correct forum for the  
2 question of the exchange agreement and its interpretation, what  
3 we're hoping is the anti-suit litigation fails, and there is a  
4 stay in the U.K., so the U.S., this Court, can adjudicate this  
5 issue of the exchange and the harm and the fraud.

6 To be frank, the lawyers in London cost two to three  
7 times what I cost. So the hardship of cost on this small  
8 business is much better dealt with through the U.S. case.

9 I guess there's one last point I'd like to make on  
10 this, is that the possibility of inconsistent outcomes here.  
11 Because the fraud was perpetrated in the U.S., because it was a  
12 fraud on the U.S. government, it's questionable whether that  
13 fraud is actionable in the U.K. So, to the extent the Court is  
14 inclined to entertain -- well, in the event we're -- we're  
15 moving forward with a motion, we'll address that in our motion.  
16 With regard to stay, frankly, we'd like to see this case go  
17 forward and the U.K. case to be stayed if the anti-suit fails.  
18 So, those are our positions there.

19 THE COURT: Thank you. Can I try to draw an inference  
20 from your comments. Let me just step back and lay the  
21 groundwork for the inference and resulting question.

22 So, the defendant QIPCO is asking for a stay pending  
23 briefing and resolution of their anticipated motion. There is  
24 a separate question and related question which is what's going  
25 to happen in the U.K. with respect to their resolution of the

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1 anti-suit injunction application. I think that one could view  
2 each of those two things as separate. So what I'm going to do  
3 is to frame the possibility of two different types of stays,  
4 and I'm then going to draw any inference and ask you all a  
5 question.

6 The first stay would be a complete stay of this  
7 action, including answers and motion practice, pending  
8 resolution of the anti-suit injunction litigation in the U.K.  
9 Counsel for plaintiff just picked up on one of the reasons why  
10 that might make sense, namely the risk of inconsistent  
11 decisions between me and the U.K. court. And I expect the U.K.  
12 court will have a better sense of the U.K. law than I will.

13 The issue is that if we begin litigation of the motion  
14 to dismiss while that litigation is pending in the United  
15 Kingdom, that we could end up with inconsistent results and the  
16 parties will be forced to be running two bills simultaneously  
17 litigating that issue in the U.K. court while you are  
18 litigating the motion to dismiss and potentially other issues  
19 here in the U.S.

20 The second potential scope of the stay would be the  
21 one counsel for defendant asked for, namely, a request that I  
22 stay discovery pending briefing and resolution of the motion to  
23 dismiss. The potential issue with that is that it means the  
24 parties need to brief a motion to dismiss as the price of entry  
25 into the stay which has the problems I just described.

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1           So my inference from your comments, counsel for  
2 plaintiff, is that the plaintiff may not oppose a I'll call it  
3 a plenary stay of this action pending resolution of the  
4 anti-injunction litigation in the U.K. The benefit of that  
5 would be that the parties would not be doing any work here  
6 while you don't know what the outcome will be of that, and then  
7 we could come back together to resolve whether or not a stage 2  
8 injunction was appropriate, namely one pending briefing and  
9 resolution of this motion to dismiss, once it is to be filed.

10           So, let me just float that inference, and then I'll  
11 ask the question of all of the parties, namely should I, given  
12 the anticipated hearing on the anti-injunction act proceeding  
13 in the U.K., stay this case, including motion practice with  
14 respect to it with perhaps an exception as it pertains to the  
15 answers from the other two defendants or their premotion  
16 conference letters pending resolution of the anti-suit  
17 injunction proceeding in the U.K.

18           Let me hear first from counsel for QIPCO. Counsel, I  
19 don't know that that's what you are asking for, but let me ask  
20 you what your view is regarding a stay with that kind of scope?

21           MR. SMITH: We would have no -- Dustin Smith from  
22 Hughes Hubbard & Reed appearing on behalf of QIPCO. We would  
23 have no opposition to your Honor, and we think that's a  
24 pragmatic solution to avoid unnecessary costs while we await  
25 the outcome of that decision.

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1 THE COURT: Let me hear from the other defendants.  
2 Defendant Simon Jones.

3 MR. MERRICK: We have no opposition to that either.  
4 The only small adjustment I would just make is that Simon Jones  
5 Superfreight isn't a party to the anti-suit injunction. We  
6 haven't seen the filings that are pertinent to that injunction  
7 request. But, at least as I understand it, the outcome of that  
8 wouldn't necessarily impact us. So while of course we don't  
9 oppose a complete stay, and any stay we think is a good stay,  
10 from our perspective we would like to be dismissed from the  
11 case. And I'm not sure that the anti-suit injunction would  
12 resolve that for us.

13 So, but again, if it's the choice between no stay and  
14 a complete stay, we're certainly in favor of the complete stay,  
15 but, we do believe that there are meritorious issues we could  
16 raise that are separate and independent from the arguments that  
17 QIPCO has made, and we believe that they are grounds for  
18 dismissal and should be ruled upon before any discovery  
19 proceeds.

20 THE COURT: Thank you. Understood. Counsel for  
21 Phoenix Freight?

22 MR. WHITTICAR: Yes, your Honor. Michael Whitticar.  
23 We agree with counsel for Simon Jones that there are issues  
24 unique to Simon Jones and DTD which could be litigated and  
25 resolved in this court without burdening either QIPCO or the

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1 plaintiff in term of a motion to dismiss relating to validity  
2 of the fraud claims in the Montreal Convention, which provides  
3 some unique defenses to Simon Jones and DTD that may not be  
4 available to QIPCO. And we should go ahead and probably have  
5 those heard. And then if it turns out that those motions to  
6 dismiss are not going to be granted, at that point I think a  
7 stay as to discovery and further proceedings would be justified  
8 while the London proceedings play out.

9 THE COURT: Thank you. Let me turn to counsel for  
10 plaintiff. Counsel?

11 MR. McCULLOUGH: Michael McCullough again. I think we  
12 are in an awkward position here because Phoenix has a suit  
13 against three parties. The London anti-suit is the only QIPCO.  
14 So, but with regard to QIPCO, we have a couple problems. To  
15 the extent that this case goes forward, after the decision over  
16 in the U.K. on anti-suit, we know there is going to be a motion  
17 to dismiss from QIPCO, and if that is the case, and we're  
18 dismissed, then we're back from London, if the Court decides  
19 that London is the correct forum. But in the meantime, we have  
20 to deal with the possibility of time bar on our claims or some  
21 of our claims, and again, the question of hardship because  
22 there might be certain -- there might be certain remedies we  
23 can only get in the U.S., and that would have an impact on our  
24 case against Simon Jones specifically. Because again, Simon  
25 Jones is acting as agent for QIPCO.

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1           So it is problematic for us to have this plenary stay,  
2 and again, the problem is we also don't know how long it is  
3 going to go on, and I'm worried about time bar on certain  
4 claims. And again, we might be time barred on certain claims  
5 already, and that's another hardship. And again, because of  
6 the context of the forum here and the strength of our claim,  
7 I'm concerned. I'm not trying to be difficult. I understand  
8 that the Court wants to find the best path and obviously money  
9 is a concern for everyone. So, I hear the concern. But I'm  
10 concerned about those issues.

11           I should also say one other thing, your Honor. There  
12 is one other point I haven't brought up here that I should  
13 bring up. In the U.K., because of ongoing discovery in the  
14 U.K., we will be amending our complaint with new allegations  
15 and possible new defendants on our fraud claim. That is  
16 going -- that will be pending a motion in the U.K. to release  
17 documents that are in discovery for use in this case, in this  
18 action in the U.S. Again, I'm concerned about the timing here,  
19 because we plan to amend, we might have additional claims, and  
20 we might lose those if we have a plenary stay. We won't be  
21 able to amend. So, I'm very concerned about that. Because I  
22 think the nature of this case changes a bit with regard to one  
23 or two of the defendants.

24           THE COURT: Fine. Good. So, that's fine. So, let me  
25 do this. The defendant has asked that I stay discovery pending



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1 briefing and resolution of this anticipated motion. Each of  
2 the other defendants have joined in that application.

3 A motion to dismiss does not automatically stay  
4 discovery except in cases like those that are covered by the  
5 Private Securities Litigation Reform Act, that is the PSLRA.  
6 As a result, discovery should not be routinely stayed simply on  
7 basis that a motion to dismiss has been filed. However, upon a  
8 showing of good cause, a district court has considerable  
9 discretion to stay discovery pursuant to Federal Rule of Civil  
10 Procedure 26(f)(C).

11 In determining whether good cause exists, courts  
12 consider a number of factors, including whether a defendant has  
13 made a strong showing that the plaintiff's claim is  
14 unmeritorious, the breadth of discovery, and the burden of  
15 responding to it, and the risk of unfair prejudice to the party  
16 opposing the stay.

17 Here, I've considered all of those factors in light of  
18 what I know about the case and the anticipated motion, and I  
19 find that there is good cause to stay discovery here pending  
20 briefing and resolution of this anticipated motion.

21 Let me begin with the first factor. Now, not taking a  
22 position regarding this issue and its substance. Ultimately  
23 that will be an issue that I resolve after having the  
24 opportunity to review the parties' briefing in full. I'll  
25 simply make a couple of comments and observations.

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1 First, the application would be fully dispositive were  
2 I to grant the defendant QIPCO's motion on the grounds of forum  
3 non conveniens. They have made a reasoned argument that the  
4 exchange agreement dispute arises in connection with the  
5 purchase agreement, purchase agreements which gave rise to the  
6 subject matter of the exchange agreements. Again, I don't take  
7 a position regarding the ultimate outcome of the issue, but  
8 defendant has made a reasonable showing in support of that  
9 claim. And they've pointed me to case law that plaintiff has  
10 not read by this state's highest court that they assert means  
11 that the fraud claim is not one that can be heard. So, the  
12 first factor weighs in favor of a stay.

13 The second factor also weighs in favor of a stay.  
14 That's because all cases involve discovery. It's expensive and  
15 burdensome to respond to it. Here, as I understand it, the  
16 underlying dispute involves this series of transactions  
17 involving these objects. It may involve international  
18 discovery. As a result, the burden may be substantial. Those  
19 burdens will be avoided as a result of the stay.

20 I think that the risk of unfair prejudice to  
21 plaintiffs, the party opposing the stay here, is limited. As  
22 both sides have said, among other things, discovery as I  
23 understand it in what is arguably a related action proceeding  
24 in the U.K. is ongoing. It is ongoing to such an extent that  
25 it may fuel, in plaintiff's view, potential modifications to

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1 the complaint here. So I understand that even if discovery is  
2 stayed here, that the parties also have the opportunity in  
3 those parallel proceedings to continue to obtain information.  
4 Even if they did not, however, I would not find that the risk  
5 of prejudice weighed strongly enough in favor of continuing  
6 litigation pending briefing and resolution of the motion.

7 I say that in large part because the resolution of  
8 this motion should not be substantial. My expectation is that  
9 the parties are well aware of their litigation hold  
10 obligations. I would expect you would tell me now if you are  
11 unaware of those obligations. And that as a result, I don't  
12 understand there is a substantial risk of loss of pertinent  
13 evidence. So all of these factor weigh in favor of a stay.

14 So I'm granting the defendant QIPCO's request to stay  
15 discovery in the case pending briefing and resolution of their  
16 motion. Because it doesn't make sense to take discovery from  
17 the other defendants while it is stayed as to the third, this  
18 stay applies to all parties.

19 Very good. So, now let's set a briefing schedule for  
20 the motion. One thing that I should say now that it's clear  
21 that I'm staying discovery pending briefing and resolution of  
22 this motion is that the parties may wish to meet and confer  
23 regarding whether there is an efficient way to schedule or we  
24 should do it now. We should be thinking about whether there is  
25 an efficient way for us to schedule the briefing on this

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1 motion, understanding the possibility that there may be  
2 intervening case law from the U.K. court that would impact this  
3 motion and potentially the parties' ability to engage in it.

4 So, I'd like to hear from the parties about whether  
5 and to what extent the timing of the U.K. anti-injunction  
6 proceedings should inform the scheduling for the motion to  
7 dismiss as we set our schedule now.

8 So let me start with counsel for defendant QIPCO.  
9 When would you propose to file your motion?

10 MR. SMITH: Dustin Smith from Hughes Hubbard & Reed  
11 appearing on behalf of QIPCO. Your Honor, in light of the  
12 anti-suit injunction, our thought is that it may make sense to  
13 pin the schedule off the issuance of that order. A, to avoid  
14 inconsistent decisions, but also to avoid the expense of going  
15 through briefing, if eventually the anti-suit injunction is  
16 actually granted.

17 So, our proposal would be to just set a date that's 21  
18 days after the issuance of that decision for the motion to  
19 dismiss, 14 days after for a reply, and then seven days for a  
20 response, which I think is the standard schedule. I would also  
21 just raise for consideration in light of counsel for  
22 plaintiff's statements that they are going to be seeking to  
23 amend the complaint, whether it makes sense also to wait for  
24 the amended complaint to come in to avoid unnecessary briefing,  
25 if there are going to be additional revisions to the complaint.

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1 So that we're not wasting any resources on that front.

2 THE COURT: Thank you. Just again back to  
3 Mr. Sanders' point. Do you have any sense of when that would  
4 mean? Are we looking at mid-June, end of May, any estimate may  
5 be helpful for the plaintiff as they're thinking about their  
6 position. Any more detail?

7 MR. SMITH: Dustin Smith for Hughes Hubbard & Reed  
8 appearing on behalf of QIPCO. With the caveat I'm not an  
9 English lawyer, I understand from conversations with English  
10 counsel, which admittedly were never projecting these type of  
11 estimates, that they would predict a matter of weeks or months.  
12 So, maybe mid summer, but we're not looking at, from my  
13 understanding, that we're not looking at this dragging on for a  
14 year or some extended period of time.

15 THE COURT: Let me hear from you, counsel for  
16 plaintiff. What's your view regarding that application? To  
17 just to reframe it. They're asking for me to not set a date,  
18 but rather to set it based on the date by which the ruling is  
19 released. What's your view?

20 MR. McCULLOUGH: Again, my concern is about time bar  
21 on claims because of the delay. So, I understand the concept  
22 of hoping that the U.K. court will act quickly. But, as  
23 counsel for defendants states, we don't know. Could be weeks,  
24 could be months, could be longer. So, we would not favor  
25 waiting for a decision on that question.

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1           Perhaps we can find somewhere in the middle where we  
2           can set a date beyond which we wouldn't wait any longer in the  
3           hope that that decision comes. But I would not want to make  
4           this indefinite, because it sounds like just waiting for the  
5           anti-suit injunction decision could be months away.

6           THE COURT: What's your proposal?

7           MR. McCULLOUGH: I think -- so if we're May 10. If  
8           it's weeks, I mean, I believe next week is the -- if it's next  
9           week the hearing happens, that's the 16th. Then weeks would be  
10          mid-May. Months would be much longer. I wouldn't want to go  
11          into July and August. I think I would want a June date if we  
12          could get it. If it means June 30, then perhaps that's our  
13          date.

14          THE COURT: So counsel for QIPCO, the plaintiff  
15          suggested that we schedule your motion to be due by the 30th of  
16          June. Is that an acceptable deadline?

17          MR. SMITH: Yes, your Honor. I think that's a  
18          reasonable deadline. And I would just add, if I was not clear  
19          before, that my understanding of the English procedure is the  
20          English court can also grant preliminary relief in addition to  
21          final relief so that may come sooner.

22          THE COURT: Good. Thank you. They'll have a date to  
23          work toward now. So, the briefing schedule for the motion is  
24          as follows: The motion is due no later than June 30, 2024.  
25          Any opposition will be due no later than -- I'm sorry. Make

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1 that July 1, 2024. The 30th is a Sunday. July 1, 2024. Any  
2 reply will be due no later than three weeks following the date  
3 of service of the motion. Any reply will be due no later than  
4 one week following date of service of the opposition.

5 So again, the motion is due by the 1st of July. Any  
6 opposition is due no later than three weeks, that's 21 days,  
7 following the date of the service of the motion, and any reply  
8 will be due one week thereafter.

9 I look forward to seeing the other defendants'  
10 premotion conference request letters that will be the prompt  
11 for potentially another conference or simply an order from the  
12 Court establishing a briefing schedule, depending on the nature  
13 of the issues raised. Again, I'll issue an order that  
14 establishes the briefing schedule and that also reiterates my  
15 order staying discovery pending briefing and resolution of the  
16 motion to dismiss.

17 So, thank you all very much. Is there anything else  
18 that any party would like to raise with the Court before we  
19 adjourn? First counsel for plaintiff.

20 MR. McCULLOUGH: No, your Honor. But I'll ask my  
21 co-counsel to raise anything if they have it. I think we're  
22 good, your Honor. Thank you.

23 THE COURT: Thank you. Counsel for --

24 MR. MERRICK: This is Chris Merrick. Just as a  
25 housekeeping matter, I see there is an initial conference on

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1 May 21 with some deadlines in advance beginning on Tuesday.  
2 Just in light of the issuance of the stay and the briefing  
3 schedule, just curious if your Honor might be inclined to push  
4 that back or adjourn it until these issues have been resolved.

5 THE COURT: Yes. I will adjourn it.

6 Anything else counsel for defendant QIPCO?

7 MR. SMITH: No, your Honor. We had the same  
8 housekeeping point, but it's been resolved. So nothing else  
9 from us.

10 THE COURT: Thank you. And I think there is one other  
11 defendant from whom I've not yet heard. Counsel for DTD,  
12 anything from you? Counsel for Phoenix transportation?

13 MS. SULLIVAN: This is Nicole Sullivan from White &  
14 Williams. I don't know if Mr. Whitticar lost contact or not.

15 MR. WHITTICAR: I forgot to hit my mute button. I'm  
16 not good with this advanced technology.

17 The plaintiff had mentioned it was planning to amend  
18 its complaint. And I'm wondering does it have the information  
19 it needs now to do that or can we set a schedule for that in  
20 advance of the motion to dismiss briefing schedule?

21 THE COURT: Thank you. I'll leave that to the parties  
22 to discuss and the parties' discussions will guide how you wish  
23 to proceed. Otherwise the default rules in Rule 15 apply which  
24 you can all look to. I don't know that we can make great  
25 progress here.



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1           Very good. So thank you all very much. This  
2 proceeding is adjourned.

3           (Adjourned)